Supreme Court, U.S.
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CASE NO. 87-1001

in the Supreme Court of the United States

H.K. PORTER COMPANY, INC.,
Petitioner,

v.

METROPOLITAN DADE COUNTY,
and JOHN A. DYER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The following are all parties to the proceedings below:

1. H. K. Porter Company, Inc., was appellant before the Eleventh Circuit and is the petitioner here seeking certiorari; and

2. Dade County, a political subdivision of the State of Florida, and John A. Dyer[1], individually and as contracting officer for contract Y-621, were appellees before the Eleventh Circuit and are respondents to the petition for certiorari.

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[1]As of the date of this brief, Mr. Dyer is general manager of the Southern California Rapid Transit District in Los Angeles, California.

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STATEMENT OF THE CASE

This case constitutes the second federal lawsuit where Petitioner has challenged the basis on which Dade County rejected its bid for Dade County contract Y-621. The Court of Appeals' decision in the prior case detailed the facts and procedural history of the bid and award process for contract Y-621. *See, H.K. Porter Company, Inc. v. Metropolitan Dade County,* 650 F.2d 778 (5th Cir. 1981), hereinafter referred to as *Porter I.*

Porter I was filed in late 1979 after bids for contract Y-621 were received and opened. Petitioner submitted the apparent low bid. *Porter I,* at 780. The second low bidder filed a protest claiming that Petitioner's bid failed to comply with the minority contractor participation provisions of the bid specifications. *Id.* These provisions were required to be included in the bid specifications by the federal grant which financed eighty percent of the cost of Miami's Metrorail project. *Porter I,* at 779. The provisions required a bidder as a condition of award to either involve minority-owned businesses in five percent of the contract work or to demonstrate that it had made every reasonable effort to contact and negotiate with minority-owned businesses in an attempt to subcontract portions of the work and notwithstanding such effort was unable to achieve the goal. *Porter I,* at 780.

In light of the pending bid protest, the county sought to reject all bids and to readvertise the contract. Petitioner filed *Porter I* to stop the county from taking any action with regard to contract Y-621 without first making a determination as to whether Petitioner's bid complied with the contract's minority contractor participation provisions. The district

court in *Porter I* granted the relief sought and ordered the county to conduct an administrative hearing on Petitioner's bid. *Id.* The contracting officer (Respondent John A. Dyer) conducted the required hearing and, based on the evidence presented, determined that Petitioner failed to comply with the contract's minority provisions. *Id.* He recommended award of the contract to the second low bidder. *Id.* The federal transit agency reviewed these findings and concurred in the determination that Petitioner had not complied with the contract's minority business provisions and in the recommendation to award to the second low bidder. *Porter I*, at 780-1.

Upon receipt of the contracting officer's decision, Petitioner obtained an ex parte temporary restraining order which enjoined award of the contract. *Id.*, p. 781. Petitioner also moved for an order directing the county to show cause why it should not be held in contempt for failure to conduct a fair and impartial hearing on Petitioner's bid. *Id.* The county responded by moving to dissolve the TRO. *Id.*

The district court held hearings on these motions and considered extensive evidence and testimony regarding the conduct of the contracting officer's hearing and the basis for his decision and recommendation. During the course of these hearings, Petitioner for the first time claimed that the minority contractor participation provisions were unconstitutional. *Id.* The district court held these provisions constitutional and found that the county's determination to reject Petitioner's bid was not arbitrary or unreasonable. The court dissolved the TRO enjoining award of the contract.

Petitioner filed an appeal and sought a stay pending appeal from the Court of Appeals. *Porter I*, at 781. The stay was denied and thereafter the county awarded contract Y-621 to the second low bidder. *Id.*

The Court of appeals found the appeal moot as Petitioner had only sought equitable relief to prevent award of contract Y-621 which had been awarded during the pendency of the appeal. *Porter I*, at 782. However, because the order dissolving the TRO did not constitute a full trial on the merits, the court concluded that the district court erred in reaching the merits of Petitioner's constitutional objections to the minority business participation requirements of the contract. *Porter I*, at 783. The district court's order was therefore vacated and the case remanded with instructions to dimiss Petitioner's complaint so that the district court's ruling on the constitutional issues would have "no precedential effect." *Id.*

Petitioner subsequently filed the present damage action against Dade County and the contracting officer John A. Dyer for wrongful rejection of its bid, claiming that contract Y-621's minority business requirements were unconstitutional both on their face and as applied to Petitioner's bid. (R. volume I, document 1, pps. 10-11).

Because their every action during the four months from bid opening through rejection of petitioner's bid and award to the second low bidder, had been closely scrutinized by the district court in *Porter I*, Respondents requested the court in the present case to take judicial notice of those prior equitable proceedings. (R. volume II, document 55). The court granted this request and incorporated the

record of *Porter I* in this case. (R. volume III, document 92, p.1).

The district court entered a summary judgment in Respondent's favor on the issue of liability. (R. volume III, document 92). Petitioner appealed to the Eleventh Circuit Court of Appeals which affirmed the district court's judgment. *H.K Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), hereinafter referred to as *Porter II*. This petition for writ of certiorari ensued.

In its statement of the case, Petitioner notes that the county admitted a request for admission that the five percent goal applied to contract Y-621 was not based on any analysis of the availability of qualified minority contractors. Peititoner fails to state however that the county sought to withdraw this admission in light of subsequently discovered evidence (R. volume III, document 63), and that the county proffered testimony and evidence that the goal was derived only after the work comprising contract Y-621 had in fact been analyzed to determine which portions thereof could be subcontracted out, and after those identified portions had been matched with a nationwide directory of known minority firms capable of performing such work. (*See*, R. volume I, supplemental record, transcript of hearing of November 7, 1984, pps.23-32). The Eleventh Circuit's decision noted the fact that the county proffered such information below. *Porter II*, at 332, n.10. An excerpt of the county's proffer comprises the appendix to this brief.

SUMMARY OF ARGUMENT

Reasons for denying certiorari

The first question which Petitioner here seeks to present has already been settled by this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

Petitioner's second question challenges the methodology by which the five percent subcontracting goal was derived for contract Y-621. This question misses the point because under the bid specifications, a bidder who did not meet the goal could nevertheless be awarded the contract if he demonstrated that he had made every reasonable effort in the course of preparing his bid to involve minority businesses in the contract work.

An additional reason for denying review is that the 1977 and 1978 federal regulations at issue in this case have been substantively changed as a result of subsequent Congressional enactment in 1982. Thus, any decision on these outdated regulations would have no applicability to the current law and regulations.

ARGUMENT

Dade County sought bids for contract Y-621 to procure electrified third rail for the Miami Metrorail project. The minority contractor participation provisions which Petitioner here challenges were included in the bid specifications for contract Y-621 in compliance with federal regulations applicable to contracts funded by federal transit grants. These regulations were promulgated while Congress was considering the Surface Transportation Assistance Act of 1978 (Pub.L. 95-599).

Petitioner's first question raises the issue of whether the race-conscious measures in issue are invalid because neither Dade County nor the Department of Transportation made findings of past discrimination. This question overlooks the fact that these measures were specifically approved by Congress during its consideration of the Surface Transportation Assistance Act of 1978, and that such approval occurred in the aftermath of earlier Congressional findings of racial discrimination against minority businesses.

As noted by this Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), Congress has previously found that the lack of participation of minority-owned businesses in government contracts is the result of past racial discrimination. Chief Justice Burger (joined by Justices White and Powell) held:

> "Congress had before it, among other data; evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect

to state and local construction contracting as well."

Id., at 478, 100 S.Ct., at 2774. Justice Marshall (joined by Justices Brennan and Blackmun) determined:

> "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination."

Id., at 520, 100 S.Ct., at 2796.

Although *Fullilove, supra,* involved review of the Public Works Employment Act of 1977 (PWEA), this Court held that prior Congressional action and legislation dealing with minority and small businesses could be relied on to provide the requisite findings of past racial discrimination. *Id.*, at 461, 100 S.Ct., at 2767 (Chief Justice Burger) and at 503, 100 S.Ct., at 2787 (Justice Powell).

Consistent with *Fullilove,* the Eleventh Circuit examined the legislative and historical background of the Surface Transportation Assistance Act of 1978 which appropriated money for the federal highway and transit programs. The court noted that the report of the House Committee on Public Works and Transportation on the Act:

> ". . . acknowledged a departmental initiative on behalf of the Department of Transportation ("DOT") to encourage the participation of minority business enterprises in the DOT's programs." (citations omitted)

H.K. Porter Company v. Metropolitan Dade County, 825 F.2d 324, 325 (11th Cir. 1987), *(Porter II)*. The court also analyzed the background surrounding enactment of the 42 U.S.C. §2000d. Based on its review, the court determined that Congress in these legislative enactments was addressing the need to ensure that minority business firms would be provided with a fair opportunity to participate in federally-funded government contracts and therefore it delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state and local level. *Porter II*, at 329. The Eleventh Circuit determined that the federal transportation authorities

> ". . . had the authority, pursuant to the clear and strong Congressional mandate to promulgate the MBE [minority business enterprise] program relative to contract Y-621."

and, that Dade County in implementing the minority business provision of contract Y-621 "was relying on Congress' legislative findings" and was acting

> "pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts."

Porter II, at 329, 330 and 331. In light of such findings, the court determined that Dade County

> "... was not constitutionally required to make additional findings of past discrimination regarding the awarding of this contract."

and that Congress' findings on this issue were sufficient. *Porter II*, at 331. The decision below therefore does not conflict with *Fullilove*.

The decision likewise does not conflict with the Fourth Circuit's decision in *J.A. Croson Company v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). The latter case dealt with a locally initiated race-conscious program. It thus differs from the program at issue in this case and the one reviewed in *Fullilove*, both of which were federally-mandated based on Congressional findings of discrimination. *Croson* recognized this crucial distinction when it made the following statement with regard to *Fullilove:*

> "... The Court upheld the set-aside in *Fullilove* based on Congress's well-founded belief that such a program was needed at the federal level; the Court emphasized the special competence of Congress to act on such a finding."

Id., at p.1360. The holding in *Croson* is thus not applicable to this case and therefore cannot be in conflict with it.

Petitioner's second question challenges how the five percent goal was established for contract Y-621.

This question misses the point because, as the court below noted, there was:

> "... a waiver provision which operated to excuse the bidder from contracting or subcontracting with MBE's if the bidder demonstrated that it had made every reasonable effort to contact and negotiate with MBE's, but was unable to achieve the 5% goal despite such efforts due to the fact that minority contractors were not qualified or not available."

Porter II, at 331. Failure to meet the goal was not dispositive, if the bidder had otherwise made a reasonable effort to locate and contact minority firms. Petitioner's bid was rejected because Petitioner "did not contact a single MBE," i.e., Petitioner made no effort at all. *Porter II*, at 332.

There is one further reason for denying certiorari. The federal regulations here at issue were promulgated in 1977 and 1978. Bids were opened for contract Y-621 in late 1979, and the contract awarded in 1980. Congress reauthorized the federal highway and transit programs by enacting the Surface Transportation Assistance Act of 1982 (Pub.L. 97-424). Included in this Act, was a provision which expressly mandates the participation of businesses owned by socially and economically disadvantaged

persons in transportation contracts. *Id.*, §105(f). Section 105(f) provides:

> "(f) Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 9(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto."

This provision was adopted in response to this Court's decision in *Fullilove*. Rather than continuing with the concept of minority-owned business, i.e., a business defined solely in terms of the ethnicity of its owner; Congress in Section 105(f) opted for the definition of small business owned by "socially and economically disadvantaged individuals". The Department of Transportation promulgated new regulations effectuating Section 105(f) in July, 1983. 48 Fed.Reg. 33,432 (1983) (codified at 49 C.F.R. §§23.61-.69). These regulations (with minor revisions not relevant to the issues of this case) have been in effect for the past four and one-half years. Congress has retained the ten percent set-aside for businesses owned by socially and economically disadvantaged individuals in the Surface Transportation Assistance Act of 1987 (Pub.L. 100-17, §106(c)). Any review of the outdated regulations thus would not be applicable to the current law or regulations.

CONCLUSION

For the reasons stated and upon the authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted,

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BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

I, Robert Anthony Cuevas, Jr., a member of the bar of this Court, hereby certify that on the 22nd day of December, 1987, three copies of this Brief in Opposition to Petition for Writ of Certiorari were served by U.S. mail by depositing same in a U.S. mailbox, with first class postage prepaid, addressed to CHARLES C. KLINE, ESQ., at Mershon, Sawyer, Johnston, Dunwody & Cole, Suite 4500, Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131, attorney for Petitioner.

R A CUEVAS, JR.

Assistant County Attorney

Appendix

H.K. PORTER COMPANY, INC.,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, et al.,

Defendants.

No. 81-2766-Civ-EBD

United States District Court

Southern District of Florida
Miami Division

Miami, Florida

November 7, 1984

EXCERPT OF TRANSCRIPT OF HEARING BEFORE THE HONORABLE EDWARD B. DAVIS PAGES 23 THROUGH 31

• • •

[By MR. CUEVAS:] Your Honor, again for the record, I preface of [sic] the proffer by noting that all of the witnesses whose testimony we would proffer today were in fact subpoeaned by Mr. Kline, specifically Mr. Delmar Whitington, Mr. William Skeen, Miss Lucia Raiford. They were all subpoeaned and they were subpoeaned duces tecum to bring with them all documents in their possession which relate in any way to the history of past discrimination or which pertained to the five percent MDE [sic] goal.

These were witnesses apparently Mr. Kline had already issued subpoenaes for and was prepared to present testimony about.

Specifically with regard to the witnesses, Your Honor, the first witness would have been Lucia

Davis Raiford who is the present head of the Equal Opportunity Services Division of the transportation agency. She would as head of that division and as custodian of all correspondence and records, the documents that we would have her testify as custodian to merely identify and authenticate all pertain to correspondence between our consultant and Isaac Transit Group and our staff regarding the derivation of the particular goals for the contract in issue.

It relates specifically to a memo dated July 13 from Mr. John Zito to Delmar Whittington who is here in court, regarding breakouts of the various portions of the contract work in terms of dollar value for the purpose of deriving some indication of what portions of the work could be subcontracted.

Attached to those was an actual breakout of the proposed bid form which listed each of the various items by dollar amounts. In addition, there were documents that related, and these were all attached to our motion to withdraw the admission, the documents I'm referring to now, which refer to the status in the spring and fall of 1979, the fact that the County did not have statistics by UMTA of its minority business enterprise plan and correspondence going back and forth from Dr. Dyer, who was then the head of the Transportation Department, to the regional administrator for UMTA in Atlanta which directed specifically, because we did not have this overall MDE [sic] statistics that we were instructed by UMTA to apply goals to each procurement contract.

And these letters predate the issuance of addendum No. 3 on the contract in issue.

The final letter is a letter in response back from Dr. Dyer to Mr. Campion, the Regional Director, saying in response to your direction and meeting with your civil rights staff, this is to advise you that we will in fact apply goals as per your instructions to each of the contracts, each procurement contract of which this contract is one.

Secondly, here is how we are going to do it. It will be based on an availability of known minority businesses out there. It will be based on the potential for subcontract. It would be based on all of the things from a professional and technical viewpoint would be appropriate in devising a goal and applying it to the contract.

These letters are again attached and dated in July and early August of 1979, and of correspondence between the County.

The purpose of having Miss Raiford testify to these documents, Your Honor, because these documents had not been contained in what are called the contract specific files of the department. Normally, things would be filed, Your Honor, by contract number. This particular contract is Y621.

In seeking to respond to Counsel's earlier discovery, the search for the records simply went as far as going back to the Equal Opportunity Services Division and looking for the contract number and what was in there. The documents Miss Raiford, and I have mentioned in this proffer so far, that Miss Raiford would identify, these were apparently misfiled and contained generally in the correspondence files of the Equal Opportunity Services Division, and they were simply filed chronologically with no specific category as to contract or type of work, and

that is the reason why the County had made diligent search of its records and was unable to find these items because Miss Raiford was involved in that as well and then when we went back on a second time on finding out Mr. Whittington had been under subpoena and he was in fact, he was no longer with the Transit Department.

We contacted him. He had indicated that there was in fact a goal study and methodology done and an analysis specifically relating to this contract as to what would be out there in terms of minority businesses and how to match those with particular work at issue.

And she would testify when going back and looking at the general correspondence files a second time, that these documents were come upon and that is they were misfiled and they were in fact public records and simply in the wrong file.

We would next call, Your Honor, Mr. William Skeen, who at the time in July and August of 1979 was the Contracts Manager of the Technical Services Division of the Transit Department.

Mr. Skeen in his capacity was really the person in charge, a conduit through whom all of the various contract language and provisions would come together and be assembled and he would review them. He specifically had documents that we would have presented to the Court which relate initially, and since these have not been — the documents I am now referring to have not been attached as part of any motion or any filing, I perhaps ought to at least proffer them to the clerk to get marked for identification.

But specifically he had advance notice to bidders which went out with this particular contract which lists some twenty or thirty different minority business councils and associations that the County sent notice of this contract to in an attempt to try and generate interest in minority firms and to apprise them of the availability of this contract for bidding.

Specifically, he also had a memorandum from Mr. James Corbin, who was then the head of the Equal Opportunities Division to him which, first of all, set the goal at fifteen percent for this contract and a subsequent confirming memo from the consultant, Kaiser Transit Group, confirming that the goal had been reduced from five percent to fifteen percent.

I might add the timing for the reduction in the goal from fifteen to five percent, the date of that letter corresponds to roughly ten days subsequent to when Mr. Whittington sat down with Mr. Zito and went through the breakout of the contract work and tried to match the availability of firms with the work that was available.

The final document that Mr. Skeen would have is a telegram from the second low bidder asking for additional time to submit their bid because of their receipt of addendum 3 which is the same addendum that Porter was applicable in this case.

It simply shows the second low bidder was under the same time constraints as Porter was.

I would seek to offer these as, I guess, a composite exhibit for identification as relating to what Mr. Skeen would testify.

The next witness, Your Honor, would be Mr. Delmar Whittington. Mr. Whittington was employed

by the Equal Opportunities Services Division in July and August of 1979. He was the person who was directly and personally involved in working on the derivation of the goal. He would testify as to the documents that were — the authenticity of the documents that were attached to our motion to withdraw the two admissions.

The fact that he did sit down with our engineering consultant, Mr. Zito, and the engineer broke out the components of the contract work in issue that Porter bid on and they went through the types of work and the types of firms that could do that work.

Mr. Whittington went through his directory of minority businesses know as the Try Us Directory, which is a list of known minority businesses nationwide. That particular directory was made available in response to answers to interrogatories. We actually attached to our supplementary answers to Porter's interrogatories that are on file.

Mr. Whittington would take the documents that relate to the breakout of the contract work that Miss Raiford had found to have been misfiled and testify as to how those documents were utilized and how the five percent goal was in fact determined for this contract, and the basis therefor.

The final witness, Your Honor, that would be the defendant Dr. John Dyer.

Dr. Dyer at the time in issue was the head of the County's transportation administration and was the contracting officer for the particular contract. Dr. Dyer would relate to the Court the specific history of the attempts to get at minority business statistics from UMTA, the fact that these letters were misfiled that Miss Raiford found that relate to correspon-

dence between himself and the UMTA region set forth the specific directions to him by the relevant Federal agency mandating him, the County, to impose quotas in the County's contracts, saying we would comply.

This is our methodology we would match known minority businesses that were available with the work that is being bid on and set our goals on that basis.

In addition, Dr. Dyer would testify that in the course of his proceedings while this bed [sic] was being review [sic], that UMTA as well was reviewing the decision that would ultimately be made because the question was raised whether the County in whatever decision it made with regard to whom to award to was properly applying minority business requirements of the Federal agency.

Dr. Dyer had correspondence which would indicate from the Civil Rights Division of the Washington Office of UMTA that they specifically asked to review everything that he did at the local level for their review and concurrence or non-concurrence to determine all of the Federal prerogatives were in fact being complied with.

The correspondence indicates, there is a letter dated November 9th from Washington UMTA, the Director of Civil Rights, Harold William, directly to Dr. Dyer, and his responses back on December 12, both to the Washington and to the Regional Office in Atlanta, which said, In response to your November 9th letter, here is my decision as contracting officer, who [sic] is what I propose to do, I find Porter non-responsive, recommend rejection of the bid and recommend awarding of the bid to the sec-

ond low bidder, all based on Porter's lack of compliance with the minority requirements and the fact that TPI did comply.

The final matter, and that is in evidence before Judge Kehoe, it's exhibit, Plaintiff's Exhibit 12, the December 19 hearing in the prior proceedings.

The response back from the Regional Director concurring in Dr. Dyer's decision and an attachment to it from Mr. Harold Williams who specifically finds the County in establishing the five percent goal did so in accordance with the relevant UMTA circular.

So that would be the history and the chronology of what was involved in that regard.

* * *